NexGen energy

Kansas Corporation Commission
ATTN: Don Low
1500 SW Arrowhead Road
Topeka, KS 66604

RE: Proposed Questions for the Net Metering and Easy Connection Act

July 27, 2009

Dear Mr. Low,

NexGen Energy Partners, LCC (NexGen) thanks the Kansas Corporation Commission (KCC) for the opportunity to provide comments concerning the implementation of the recently enacted Net Metering and East Connection Act in HB2369. NexGen is a renewable energy service provider based in Boulder, Colorado currently working with facilities and businesses in Kansas. Numerous entities across the state including schools, colleges, correction facilities, municipalities and businesses have expressed interest in partnering with NexGen to receive renewable energy services. NexGen installs and owns custom-designed renewable energy systems at our customers' facilities that supply some, but not all, of a customer's electrical load. Entities interested in our services are located in the service territories of investor-owned utilities, electric cooperatives, or municipal utilities.

For the majority of questions posed by KCC staff concerning net-metering and interconnection, we wish to associate ourselves with the comments filed by Joseph Wiedman on behalf of Interstate Renewable Energy Council (IREC), a non-profit organization committed to accelerating the sustainable utilization of renewable energy of which NexGen is a member.

For the purposes of brevity, we seek to comment specifically on the question of the propriety of third-party ownership, a model crucial to our business and to the cost-efficient development of renewable energy in Kansas and across the United States.

<u>Third-party ownership is good for Kansas ratepayers.</u>

Third-party ownership provides significant benefits to Kansas ratepayers seeking to take advantage of local renewable energy resources. Put simply, it makes renewable energy financially feasible.

Non-profit organizations, schools and other government entities are not able to take advantage directly of federal tax benefits that make renewable energy installations with significant initial costs financially attractive. Third-party ownership allows ratepayers to fully utilize the complete spectrum of available federal tax benefits indirectly through

the solution provider. This directly impacts both the up-front and long-term cost of renewable energy and often makes the difference in whether a ratepayer is able to enjoy a renewable energy system for their home or facility.

Many of these same ratepayers, including commercial entities, cannot afford the substantial upfront capital investment renewable energy installations require. Third-party ownership allows these entities access to installations without significant up-front costs.

Finally, third-party ownership often relies on a performance-based payment mechanism that best aligns the incentives of host ratepayers, third-party owners, and other stakeholders to ensure that renewable energy systems are well maintained and operate at maximum output.

For all of these reasons, third-party ownership has been a major driver for renewable energy installations in other states and will be in the same in Kansas as well. In addition to benefiting ratepayers, third-party ownership will benefit indirectly a wider swath of Kansas' economy, as new renewable energy developments spurs new local construction and service jobs as well as an increased demand for supplies to install and maintain these systems.

<u>HB2369 statutory language is an implicit endorsement of third-party ownership.</u>

Sec. 9(b) of HB 2369 defines a "customer-generator" as the "owner or operator" of a net metered facility. In its request for comment, the KCC asks about the difference between an owner and operator. It also asks whether this definition allowed third party ownership. NexGen submits it does.

By choosing the term "customer-generator" for its net-metering legislation, the Legislature used the same term employed in states like Colorado, Oregon, and Ohio, where third-party ownership is now practiced.

The Legislature's clear choice to define the customer-generator as the "owner *or* operator" (emphasis added) is significant. Even under a third-party owner model, the ratepayer is still considered the operator of a renewable facility. It is the ratepayer that initiates and is the contracting party to the utility provider in the interconnection contract. It is the ratepayer who has responsibility for the utility meter. In addition, the customer-generator is considered an equitable owner as well, as they have demonstrable equitable interest in the electric power produced by the onsite generation facility and control the premises on which the renewable energy facility is sited.

<u>Other Public Utility Commissions have taken implicit legislative direction to make third-party ownership explicit.</u>

In Oregon, the Oregon Public Utility Commission faced a situation where there was no clear endorsement of a third-party ownership in the controlling legislation. It concluded that "neither the statute itself nor existing Commission rules place any limitations on third-party ownership of net-metering facilities." (Oregon PUC Order #08-388, p. 8) It ruled that third-party ownership was permissible. (Oregon PUC Order #08-388, p. 7)

In Ohio, the Public Utilities Commission faced a similar situation. It noted that SB 221, its controlling legislation, did not prohibit third-party ownership. Instead required that the "qualifying generating facility be located on the customer-generator's premises." Ohio's legislation defined customer-generator as a user of the net metering system. "Accordingly, we read SB 221 to mean that it is permissible for a customer to rent or lease the generating equipment." (Ohio 06-653-EL-ORD, para58)

Third-party ownership is a private service, not a public one

In its request for comments, KCC staff highlights the tension between HB 2369's implicit endorsement of third-party ownership and the right of certified public utility under K.S.A. 66-1, 173 to be the exclusive provider of retail electric service in a given territory. We submit that third-party ownership is not a public service, but a private one.

Other Public Utility Commissions agree. In Oregon, the PUC concluded third party owners were not electric services suppliers (ESS) because they did not provide "ancillary services" such as scheduling, load shaping, reactive power, voltage control and energy balancing services. (Oregon PUC Order #08-388, p. 14)

In Colorado, the PUC also recognized a tension between the regulated monopoly statues and the renewable energy statutes passed by the legislation (Colorado PUC C07-0676, para 93). In that case, the Colorado PUC noted that the tension was relieved by the regulated utility's willingness to waive its right to be the exclusive provider of retail electricity to streamline the process. (para 94) But more importantly it found the tension relieved by the fact that the third party role is distinct from the public utility. "They are not required to hold themselves out to serve all who request service within a geographic area. The third party developer merely provides a service to those with whom it contracts." (para 95)

Turning to Kansas law, K.S.A. 66-104(a) defines a public utility to include "every corporation, company, individual, ... that now or hereafter may own, control, operate or manage, **except for private use**, any equipment, plant or generating machinery, or any part thereof, ... for the production, transmission, delivery or furnishing of heat, light, water or power." (emphasis added.) See, *Kansas Gas & Electric Co. v. Public Service Commission*, 124 Kan. 690, 261 P. 592, 594 (1927). An "electric public utility" is "any

public utility, as defined in K.S.A. 66-104 ... which generates or sells electricity." K.S.A. 66-101a.

As noted above, K.S.A. 66-104 includes as an exception to "public utility" status the "private use" of equipment, plant or generating machinery for the production, transmission, delivery or furnishing of heat, light, water or power. This indicates that a customer's self-furnishing of power for its own use does not make it a public utility. It also defeats a utility's claim against the customer for unlawful bypass of its exclusive right to serve.

The "private use" exemption was addressed by the KCC in Decision No. 93-WSRG-165-Com, *supra* (the "Midcoast" case), wherein the Commission held that "there is no requirement under Kansas law that an entity must hold itself out as serving the public generally to be deemed a public utility." *Id.* at p.5 (*citing, Cities Service Gas. Co. v. State Corp. Commission*, 222 Kan. 598, 611, 567 P.2d 1343 (1977)). Thus, "an entity may not unilaterally invoke the private use exemption and thereby avoid Commission jurisdiction, merely through the device of ... a series of individually negotiated contracts." *Id.* The issue of whether a business is a public utility must be determined by the character of its operations. *Id.* Since, in Midcoast, the natural gas service supplier provided natural gas in a manner physically identical to the utility, and established a pattern of conduct which indicates it was willing to provide natural gas service wherever and whenever it can do so at a profit, the KCC ruled that there was no tenable basis upon which Midcoast's business would qualify for the private use exemption. *Id.* at p.6.

However, in another case the KCC ruled that a natural gas supplier (Brock) providing gas from two gathering systems to two customers (one customer per gathering system) was not a Public utility. Docket No. 97-UNCG-232-COM (1998). The KCC noted the Kansas Supreme Court's decision *in State, ex rel., v. City of Coffeyville*, 138 Kan. 909, 28 P.2d 1032 (1934), in which the Court held that a gas producer selling gas to one customer was not engaged in the general commercial distribution of gas and was not within the statutory definition of a public utility. Utilizing the character of operations test as discussed *in Cities Service, supra*, the KCC held that Brock's operations with one customer for each gathering system did not constitute the actions of a public utility. The Commission noted that sales by Brock were seasonal, there were at least two months during the year when there were no transactions between Brock and its customer, neither of the gathering systems bought gas from wells and gathering lines owned by non-affiliated entities, and the sales were through a gathering system less than 15 miles in length. The amount of sales also was relatively small. The KCC concluded that selling gas under these conditions does not constitute operating in connection with or for the general commercial supply of gas, and thus Brock was not operating as a public utility with respect to its operations.

Under third-party ownership, services are isolated to serve one customer, and as such each customer is self-furnishing a portion of its own power needs, consistent with the private use exemption. Third-party providers are not providing service in a manner identical to the utility, again because each system it builds serves only one customer, and is designed to deliver minimal net excess generation, unlike the utility scale generation units that utilities build or contract with to provide power to all their customers. All of the energy produced by these facilities will be consumed only by the onsite customer. In these particulars, NexGen is no different than the gas producers in *Brock* and the *City of Coffeyville* cases and it is not a public utility.

Based on precedent established in *Brock* and the *City of Coffeyville*, third-party ownership is not in conflict with public utilities.

In summary, NexGen thanks the KCC for the opportunity to comment on this important legislation. We hope that soon Kansas ratepayers including schools, businesses and municipalities across the state can harness clean, locally generated renewable energy to provide them clean, renewable energy produced on their land.

Regards,

John M. Brown
President